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Supreme Court, U.S.
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No. 97-1280

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

KAWERAK REINDEER HERDERS ASSOCIATION,

Petitioner,

v.

THOMAS E. WILLIAMS, ALASKA REINDEER HERDERS, INC., and REINDEER HERDERS ASSOCIATION, INC.,

and

BRUCE BABBITT, Secretary of the Interior, and NILES CESAR, Juneau Area Director of the Bureau of Indian Affairs.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

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1. Respondents, in their desire to avoid plenary review by this Court, have taken the tactic of attempting to minimize the significance of the decision below to an untenable extreme. Thus, both the federal and private respondents insist that the Ninth Circuit panel majority merely engaged in a traditional exercise of statutory construction without deciding *any* constitutional question. Federal Opp. 7 ("The court of appeals' opinion makes reference to potential constitutional concerns, . . . [but] did not squarely decide any constitutional issue"); Williams Opp. 1 (The case does not involve the issue of "whether application of the *Mancari* standard of equal protection review of Indian classifications is restricted to those addressing 'uniquely Indian interests,'

because the Ninth Circuit did not hold that it is"). On the contrary, the panel majority plainly and unequivocally held that application of the *Mancari* constitutional standard of review turns on whether the classification is addressed to "uniquely Indian interests" or "unique Indian concerns," an issue that is answered with a four-part inquiry into whether the classification relates to "Indian land, tribal status, self-government, or culture." Pet. App. 15a-19a. Respondents' proffered reading of the opinion is indefensible.

2. Respondents pursue their strategy of misleading with the straw-man suggestion that petitioner has failed to present for review the real issue in the case, namely, "the specific issue of statutory construction that the court of appeals actually decided." Federal Opp. 8; *see also* Williams Opp. 4-5. But petitioner's quarrel is with the court's treatment of the Constitution, *not* its application of principles of statutory construction. The panel majority squarely held that there was a gap in the statute resulting from its silence with respect to the permissibility of non-Natives importing reindeer from outside the State for commercial purposes, that the Secretary was empowered to fill in that gap, and that his interpretation was "not unreasonable" and hence must be accorded *Chevron* deference. Pet. App. 9a-10a. The statutory-construction issue was thus resolved in petitioner's favor. The majority then proceeded, however, to invoke the doctrine of "constitutional doubt" (*id.* at 11a-14a), *see Almendarez-Torres v. United States*, 118 S. Ct. 1219, 1227-28 (1998); *id.* at 1234 (SCALIA, J., dissenting), and supplant that reasonable construction with one of the court's own making. Pet. App. 15a-21a. It is here—with the majority's interpretation and application of the *Constitution*—that petitioner's complaint arises.

Only by limiting the *Mancari* equal-protection standard of rational-basis review to those statutes that relate to

"uniquely Indian interests" (in conjunction with its expressed doubts as to the continued vitality of the *Mancari* doctrine *vel non*) did the majority enable itself to devise a construction of the statute (and not a plausible one, either, as discussed below) different from the one required by the standard tools of statutory construction. Manifestly, the majority interpreted and applied the Constitution in order to determine that the otherwise-required meaning of the statute raised grave constitutional doubts. And equally clear, if petitioner is right that the opinion below misconstrued and misapplied the *Mancari* doctrine (and that the doctrine retains full vitality), and hence that the constitutional questions are not truly grave and doubtful, a decision from this Court to that effect will restore the Secretary's favorable construction of the Act.[1]

3. Private respondents stress that the Ninth Circuit

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[1] The Solicitor General appears to dispute that the intent of the Act was to eliminate all non-Native ownership of reindeer and related facilities in Alaska (Federal Opp. 2 n.1), while private respondents acknowledge that "Congress condemned every reindeer in Alaska owned by non-Natives." Williams Opp. 8. Private respondents are correct. At the time of passage of the Act, the Secretary had informed Congress that "[n]onnative holdings . . . comprise one-fourth of the reindeer in Alaska," and "that the reindeer industry will not be assured permanently to the natives of Alaska unless all possibility of white ownership be eliminated." Letter of 17 May 1937 from Secretary Ickes to Hon. Lex Green, *reprinted in* H.R. REP. NO. 1188, 75th Cong., 1st Sess. 5 (8 July 1937). Congress gave the Secretary the power he requested. *See also* Brief for the Federal Appellees 29, 9th Cir. No. 95-35607 ("The Reindeer Act reflects Congress's determination that a one-time federal buy-out of all subsequently acquired non-Native reindeer and related equipment was necessary to reverse the deleterious impacts of non-Native ownership and to reserve the reindeer industry to Alaska Natives"); FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 410-11 (1942).

majority did not actually hold that this Court's decisions in *Mancari* and succeeding cases are no longer good law in the wake of *Adarand*. Williams Opp. 1, 3-4. It would be truly remarkable if the lower court had expressly so held, in the teeth of this Court's repeated admonitions that other courts are not free to announce that one of this Court's precedents has been overruled by implication. *See, e.g., Agostini v. Felton*, 117 S. Ct. 1997, 2017 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). That the court of appeals was not so bold as to exercise authority it did not possess, however, hardly diminishes the fact that, aside from its newly devised test for applying the *Mancari* standard of constitutional review, the court quite clearly and expressly questioned the continued viability of that doctrine. Pet. App. 19a-20a. Nor does that circumstance make the issue any less worthy of this Court's review.

The significance of the panel majority's construction and application of the applicable constitutional principle is underscored by the point that its view has led it to judicially design a statutory scheme that only a deranged Congress would have adopted. Under the statutory program as it will now operate under the ruling below, non-Natives such as respondent Williams will be permitted to import "non-Alaskan reindeer" and enter the commercial reindeer business. Such non-Natives will be accorded a distinct competitive advantage over Alaska Native herders, because non-Natives will be allowed to sell reindeer to other non-Natives for commercial purposes, while the statute (§ 500i) explicitly prohibits Alaska Natives from selling reindeer to non-Natives (except for slaughter or permanent export). Meanwhile, the Secretary, pursuant to the trust responsibility placed upon him by the Act (*see* Federal Opp. 8), will be obliged to monitor the newly created non-Native sector of the industry and buy out or condemn non-Native businesses

whenever he determines (as he inevitably will) that non-Native commercial herds are having an adverse impact on the Native industry. *See* Pet. App. 40a.

The decision below has thus created a non-Native reindeer industry in Alaska (contrary to the undeniable intent of Congress) and, along with it, a guaranteed *government* market for reindeer acquired by non-Natives. This remarkable program, moreover, overtly discriminates against Native herders solely on account of their status as Alaska Natives. This astonishing result is accomplished entirely in the name of avoiding a grave and doubtful constitutional question. This Court should review the Ninth Circuit's understanding and application of the constitutional principle which is the alleged cause of such an absurd statutory regime.

4. Finally, both the federal and private respondents speculate that the consequences of the decision below will not be far-reaching. Federal Opp. 8; Williams Opp. 12-13. The federal respondents provided a sufficient answer to this contention in their brief in the Ninth Circuit, in which they emphasized "[t]he potentially deleterious impact of non-Native commercial reindeer enterprises on the Native reindeer industry":

> Appellants [private respondents] cannot carve themselves out of Congress's scheme on the ground that their particular impact on the Native industry might be *de minimis*. *Cf. Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (holding preventative regulation proper under the Commerce Clause if individual activity, when multiplied, contains threat to the economy). Congress clearly had in mind the cumulative effects of non-Native

> ownership of reindeer when it enacted the Reindeer Act. As recognized by the IBIA, Congress understood that "herds of a size to threaten the Native industry could well evolve from an initially small number of reindeer." 23 IBIA at 66 n.24. That understanding was evidenced by the acceptance of the Secretary of Interior's amendment to the proposed Act which allowed the Interior Department to purchase escaped and stray reindeer. Absent this provision, the Secretary argued, the situation sought to be "eliminated entirely" would recur. Appellants [private respondents] would have this Court ignore the very circumstances that led to the enactment of the Reindeer Act in the first instance, that is, usurpation of the government-sponsored reindeer industry by non-Natives.

Brief for the Federal Appellees 29-31, 9th Cir. No. 95-35607 (footnote omitted).

* * * *

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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